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 8  
 9

10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA  
 12

13		) Case No. C-07-5800-SC
14	Chelsea, LLC, Mark Russo, Allen	)
15	Loretz, and Ivan Simpson, individually	)
16	and on behalf of all others similarly	)
17	situated,	)
18		)
19	Plaintiffs,	)
20		)
21	vs.	)
22		)
23	Regal Stone, Ltd., Hanjin Shipping,	)
24	Co., Ltd., Conti Cairo KG, NSB	)
25	Neiderelbe, Synergy Maritime, Ltd. <i>In</i>	)
26	<i>Personam</i> ; M/V Cosco Busan, their	)
27	engines, tackle, equipment	)
28	appurtenances, freights, and cargo <i>In</i>	)
	<i>Rem</i> ,	)
		)
	Defendants.	)
		)

Courtroom: 1, 17<sup>th</sup> Floor  
 Honorable Samuel J. Conti

25 Regal Stone Ltd., ("Regal Stone") having made a limited appearance on behalf of  
 26 the COSCO BUSAN *in rem*, hereby submits the following opposition to Plaintiffs' *Ex*  
 27 *Parte* Motion for Order to Show Cause Why a Protective Order to Supervise or  
 28 Otherwise Limit Communications With Putative Class Members Should Not Issue.

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REGAL STONE LTD.'S OPPOSITION TO PLAINTIFFS' *EX PARTE* MOTION FOR ORDER TO SHOW  
 CAUSE WHY A PROTECTIVE ORDER TO SUPERVISE OR OTHERWISE LIMIT COMMUNICATIONS  
 WITH PUTATIVE CLASS MEMBERS SHOULD NOT ISSUE - Case No. C-07-5800-SC

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1 I. INTRODUCTION

2  
3 Plaintiffs' *Ex Parte* Motion is an unprecedented and improper attempt to interfere  
4 with a *federally mandated* Claims Process which has been instituted under the  
5 oversight of the United States Coast Guard following the November 7, 2007 COSCO  
6 BUSAN oil spill.<sup>1</sup> Federal oil pollution law requires that, following an oil spill, the  
7 designated Responsible Party fund a Claims Process to provide compensation to  
8 individuals and entities who suffered damages as a result of the spill. The purpose of  
9 this requirement is to provide full compensation for any damage suffered as a result of  
10 the oil spill to any entity affected – crabbers, fishermen, processors, etc. – without the  
11 need for lengthy litigation.

12 In compliance with this mandate, Regal Stone, the designated Responsible Party  
13 in connection with the COSCO BUSAN oil spill, has funded and will continue to fund a  
14 Claims Process. Contrary to Plaintiffs' Motion, neither Regal Stone nor any of the other  
15 Defendants control the Claims Process. Rather, the claims process is administered by  
16 Hudson Marine Management Service ("HMMS") under the general oversight of the  
17 Federal On Scene Coordinator ("FOSC"). HMMS is not a party to this lawsuit.

18 By all accounts, the Claims Process in place has been very successful, processing  
19 over 300 claims and providing "up-front" money to fishermen and crabbers who claim to  
20 have been damaged as a result of the delay in the opening of the fishing season. HMMS  
21 has processed claims not only from unrepresented individuals, but has also worked with  
22 attorneys representing groups of fishermen in order to efficiently compensate all  
23 claimants as soon as possible. Indeed, it is the efficacy of the Claims Process that has  
24 spawned the instant motion. To put it simply, Plaintiffs' counsel is distressed by the

25 <sup>1</sup> Plaintiffs' Motion is replete with misrepresentations regarding the oil spill, the clean-up efforts that  
26 followed and the resulting environmental impact. Plaintiffs' "facts" in this regard are supported by  
27 nothing more than citations to allegations in their own Complaint. As set forth in the accompanying  
28 Objection to Evidence, such citations are improper. However, because these issues are not relevant to the  
Motion before the Court, Regal Stone will not respond further to Plaintiffs' misstatements.

1 number of potential class members whose claims are being processed and paid through  
 2 the Claims Process. The more individuals and entities that are compensated through  
 3 the Claims Process means the less potential class members – and therefore less  
 4 attorneys fees – for Plaintiffs.<sup>2</sup> In an unprecedented effort to prevent claimants from  
 5 being compensated without litigation, Plaintiffs’ counsel is asking this court to interfere  
 6 in a federally mandated process over which it has no oversight responsibility. Plaintiffs’  
 7 request for an Order to Show Cause should be denied.

## 9 **II. THIS *EX PARTE* MOTION IS IMPROPER ON ITS FACE**

10 Without regard to the merit (or, in this case, lack thereof) of Plaintiffs’  
 11 contentions, Plaintiffs’ *Ex Parte* Motion is defective on its face and must be denied.  
 12 Northern District Local Rule 7-10 requires that an *ex parte* motion “include a citation to  
 13 the statute, rule or order which permits the use of an *ex parte* motion to obtain the relief  
 14 sought.” (ND CA Rule 7-10). Plaintiffs have failed to comply with Local Rule 7-10.  
 15 Indeed, *ex parte* motions are appropriate in limited situations and should not be  
 16 submitted unless the relief requested is warranted pursuant to the requirements set  
 17 forth by the court. Plaintiffs’ wholesale failure to provide authority as a basis for their  
 18 *ex parte* motion renders it improper.

## 19 **III. PLAINTIFFS’ REQUEST FOR IMMEDIATE INJUNCTIVE RELIEF IS** 20 **IMPROPER**

21 Incredibly, at the conclusion of their motion Plaintiffs request that the Court  
 22 “immediately enjoin the Claims Process and associated communications by Defendant or  
 23 their agents” without citing a single legal authority for such a proposition. Although it is  
 24 unclear what category of injunctive relief Plaintiffs seek, it appears that Plaintiffs

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25  
 26 <sup>2</sup> It is ironic that Plaintiffs are attempting to stop the prompt resolution of claims through the Claims  
 27 Process when they have done absolutely nothing to prosecute their lawsuit beyond demanding that a  
 28 security be posted on the vessel. To the best of Regal Stone’s knowledge, Plaintiffs have not served a  
 single Defendant in this action.



1 request the Court to issue a preliminary injunction “until a Revised Claim Form and  
2 Revised Cover Letter [described by Plaintiffs] is drafted and approved by the Court.”

3 The function of a preliminary injunction is to preserve the status quo and to  
4 prevent irreparable loss of rights prior to judgment. Sierra On-Line, Inc. v. Phoenix  
5 Software, Inc., 739 F2d 1415, 1422 (9<sup>th</sup> Cir. 1984). Furthermore, “a preliminary  
6 injunction is a drastic and extraordinary remedy that is not to be routinely granted.”  
7 Intel Corp. v. ULSI Systems Technology, Inc., 995 F2d 1566, 1568 (Fed. Cir. 1993).  
8 Considering the extraordinary nature of the relief sought, it is particularly egregious  
9 that Plaintiffs do not even attempt to satisfy the requirements attendant to obtaining a  
10 preliminary injunction. Namely, Plaintiffs do not demonstrate that (1) legal remedies  
11 are inadequate and (2) they risk irreparable injury if the injunction is not granted.  
12 Weinberger v. Romero-Barcelo, 456 US 305, 312 (1982); see also; Stanley v. University of  
13 So. Calif., 13 F.3d 1313, 1320 (9<sup>th</sup> Cir. 1994). In addition, Plaintiffs fail to show they  
14 have standing to seek the injunction by *proving* they have sustained “an injury in fact.”  
15 Lujan v. Defenders of Wildlife, 504 US 555, 560 (1992).

16 Finally, pursuant to Federal Rule of Civil Procedure 65(a), a preliminary  
17 injunction carries with it the requirement that the “adverse party” be given notice by the  
18 party seeking the injunction. Plaintiffs’ effort to achieve an injunction as to the Claims  
19 Process without any apparent effort to give notice to HMMS (the entity responsible for  
20 directing it) or any other entity involved in the governance of the claims process, such as  
21 the U.S. Coast Guard, is entirely inappropriate. Plaintiffs’ baseless request that the  
22 Court enjoin the claims process should be denied.

#### 23 IV. THE CLAIMS PROCESS

##### 24 A. FEDERAL LAW MANDATES THE CLAIMS PROCESS

25 The primary federal statute which governs oil spill liability in the U.S. is found in  
26 the Oil Pollution Act of 1990 (OPA ’90), which amended the then existing versions of the  
27 Federal Water Pollution Control Act (“FWPCA”) and Clean Water Act. See OPA ’90 (33  
28

1 U.S.C. § 2701, *et seq.*). OPA '90 establishes the oil pollution liability and compensation  
 2 regime for the United States. In the event of an oil spill, OPA '90 provides for a  
 3 statutorily mandated process by which those damaged by the oil spill may present  
 4 claims to the Responsible Party. OPA '90 was passed in the wake of the Exxon *Valdez*  
 5 tanker accident off Alaska in 1989.<sup>3</sup> One of the primary functions of OPA '90 is to ensure  
 6 that the Responsible Party is obligated and rapidly responds to the oil spill without first  
 7 attempting to resolve questions of fault or comparative responsibility. Unocal v. United  
 8 States, 222 F. 3rd 528, 535 (9th Cir. 2001).

9 The "Responsible Party" with respect to a vessel is defined as any person owning,  
 10 operating, or demise chartering the vessel. 33 U.S.C. § 2701(32). Regal Stone has  
 11 previously accepted its designation as the Responsible Party in this matter. "Damages"  
 12 under OPA '90 include: damage to natural resources, damage to real or personal  
 13 property, loss of subsistence use, lost revenues, lost profits and earning capacity, and  
 14 increases in public services. 33 U.S.C. § 2702(b)(2).

15 With regard to the claims process, regulations promulgated under OPA '90, which  
 16 are set forth in 33 C.F.R. § 136.1 *et seq.*, govern the presentation, filing, processing,  
 17 settlement, and adjudication of claims filed for damages resulting from the discharge, or  
 18 substantial threat of discharge, of oil from a vessel into or upon the navigable waters or  
 19 adjoining shorelines.<sup>4</sup> Pursuant to these regulations, the Responsible Party "shall  
 20 establish a procedure for the payment or settlement of claims for interim, short term  
 21 damages." 33 U.S.C.A. § 2705(a). All claims for damages due to the oil spill shall first be  
 22 presented to the Responsible Party. 33 U.S.C.A. § 2713(a); 33 C.F.R. § 136.103.

23  
 24 <sup>3</sup> John G. Young, who is currently representing 45 independent fishermen in connection with the Claims  
 25 Process, has been involved as an attorney in the Exxon *Valdez* litigation since that spill occurred in 1989.  
 26 In his concurrently filed Declaration, Mr. Young describes that his experience with the *Valdez* litigation  
 causes him to believe strongly in the Claims Process as a vehicle for claimants to be "successful in  
 obtaining immediate full compensation for virtually all of the fishery income losses." (Declaration of John  
 G. Young ("Young Decl."), ¶ 6.)

27 <sup>4</sup> The claims process is also mandated by California law. See, California Govt. Code §§ 8670.51 *et seq.*  
 28



1 The Responsible Party is required to "advertise the designation [as the  
2 Responsible Party] and the procedures by which claims may be presented to the  
3 Responsible Party." 33 U.S.C.A. § 2714(b). These advertisements must be placed no  
4 later than 15 days after the date that the Responsible Party is deemed as such (id.) and  
5 "shall state that a claimant may present a claim for interim, short term damages" and  
6 "that payment shall not preclude recovery for damages not reflected in the paid or  
7 settled" claim. 33 U.S.C.A §2714(b)(2). Each advertisement is required to contain  
8 certain information regarding the oil spill, including, but not limited to, the date, time  
9 and location of the incident, the name of the Responsible Party, contact information for  
10 the person to whom claims may be presented and the procedures by which a claim may  
11 be presented. The Director, NPFC, who is the person in charge of the U.S. Coast Guard  
12 National Pollution Funds Center or that person's authorized representative determines  
13 for each incident the type, geographic scope, frequency, and duration of the  
14 advertisement required. 33 C.F.R. § 136.309.

15 The claimant bears the burden of providing all evidence, information, and  
16 documentation deemed necessary by the Director, NPFC (the person in charge of the  
17 U.S. Coast Guard National Pollution Fund Center) to support the claim. 33 C.F.R. §  
18 136.105(a). Each claim must be in writing for a sum certain for compensation for each  
19 category of uncompensated damages or removal costs resulting from an incident and  
20 must include, among other information, an explanation of how and when the damages  
21 were caused and evidence to support the claim. 33 C.F.R. § 136.105(b) & (e). It is within  
22 the discretion of the Director, NPFC, to determine if additional information not set forth  
23 in 33 C.F.R. §136.105(e) is necessary to properly process the claim for payment. 33  
24 C.F.R. § 136.105(e)(13). If a claim is presented in accordance with this section and the  
25 Responsible Party denies liability or does not pay the claim within 90 days after the date  
26 upon which the claim was presented or advertising was begun (whichever is later), only  
27 then may the claimant may elect to commence an action in court against the Responsible  
28

1 Party. 33 C.F.R. § 136.103(c).

2 As set forth above, OPA '90 and 33 C.F.R. § 136.1 *et seq.* are designed to facilitate  
3 the adjustment and adjudication of claims that a party may have without the need for  
4 litigation. Under these statutory schemes, assuming a claimant has a qualified claim,  
5 he or she can simply present the claim to the claims office and receive payment.

6 **B. FEDERAL OVERSIGHT**

7 As noted above, the Director, NPFC oversees and directs certain aspects of the  
8 claims process mandated by OPA '90 and 33 C.F.R. § 136.1 *et seq.* The following  
9 determinations applicable to the claims process are within the sole discretion of the  
10 Director, NPFC, *not Regal Stone or any other Defendant*:

11 • The Director, NPFC, determines for each incident the type,  
12 geographic scope, frequency, and duration of advertisement required and provides those  
13 requirements to the Responsible Party. 33 C.F.R. § 136.309(a) & (c).

14 • The Director, NPFC determines what evidence a claimant must  
15 provide in order to support their claim. 33 C.F.R. § 136.105(a).

16 • The Director, NPFC, determines if additional information not set  
17 forth in 33 C.F.R. § 136.105(e) is necessary to properly process a claimant's claim for  
18 payment. 33 C.F.R. § 136.105(e)(13).

19 • The Director, NPFC, determines whether a claimant's claim for  
20 removal costs and each separate category of damages should be treated separately for  
21 settlement purposes. 33 C.F.R. § 136.109.

22 • The Director, NPFC, has the discretion to request that a claimant  
23 submit information relating to any insurance policies maintained by the claimant which  
24 may apply to the damages incurred by the Claimant. 33 C.F.R. § 136.111(b).

25 • The Director, NPFC, upon written request of the claimant or of a  
26 person duly authorized to act on the claimant's behalf, reconsiders any claim denied. 33  
27 C.F.R. § 136.115(d).

1 In addition, the FOSC (either the U.S. Coast Guard or the Environmental  
2 Protection Agency) designated under the National Contingency Plan generally oversees  
3 the claims process. If at any time the FOSC or NPFC is unhappy with the claims  
4 process established, the FOSC or NPFC can unilaterally take over the claims process.  
5 (See, Declaration of Cynthia Hudson in Support of Regal Stone's Opposition to Plaintiffs'  
6 Motion being filed concurrently herewith ("Hudson Decl."), ¶13.)

7 **C. THE HMMS CLAIMS PROCESS AT ISSUE**

8 The Claims Process at issue in this matter is run by HMMS as overseen by Senior  
9 Vice President Cynthia Hudson. (Hudson Decl. ¶¶ 1, 3.) HMMS provides, among other  
10 services, services relating to claims support and environmental management. Over the  
11 last four years, the HMMS team has responded to more than 90 marine incidents.  
12 (Hudson Decl., ¶2.) HMMS was retained by Regal Stone's third party insurer to audit  
13 and monitor clean up operations and process claims in accordance with OPA '90 and the  
14 federal regulations promulgated under that statutory scheme. (Hudson Decl., ¶3.)

15 Within a day and a half of the oil spill incident, an 800 number had been  
16 established and was being advertised in order to inform claimants of their right to  
17 submit claims for damages. (Hudson Decl., ¶5.) Subsequently, advertisements were  
18 made in the Oakland Tribune, the San Francisco Chronicle and the Marin Independent  
19 Journal, and flyers were distributed throughout affected marinas. (*Id.*) HMMS also  
20 affirmatively reached out to government entities and municipalities and to claimants  
21 who had reported to HMMS but never submitted documentation in order to educate  
22 affected individuals of their right to seek relief. (*Id.*) Since November 9th, HMMS has  
23 been receiving and processing claims every business day from 9:00 am to 5:00 pm. (*Id.*)

24 In determining an appropriate claims process, HMMS collaborated with a number  
25 of industry experts such as Natural Resource Consultants ("NRC"), as well as attorneys  
26 representing groups of potential claimants. (Hudson Decl., ¶6.) HMMS representatives  
27 are working with approximately 9 attorneys representing over 196 claimants to discuss  
28

1 a process to resolve their clients' claims. Those attorneys were extremely helpful in  
2 creating a process to be used to fairly and expeditiously process claims, and in  
3 developing lists of relevant supporting documentation to "prove up" each claimant's  
4 damages. (Hudson Decl., ¶7.)

5 While the models were being developed and tested, concerns were raised that local  
6 boat owners were being caught in a financial squeeze from the season opener loss. In  
7 order to provide timely assistance and to demonstrate that the Responsible Party was  
8 committed to effectuating prompt settlements, HMMS proposed a pre-payment plan to  
9 crab boat owners/operators. The purpose of the pre-payment was to provide immediate  
10 compensation to affected crab boat owners/operators and minimize potential and actual  
11 litigation effort. (Hudson Decl., ¶11.) In order to qualify for a prepayment, claimants  
12 must agree to proceed through the claims process until such time as they receive an offer  
13 of resolution or until their claim is rejected. (Hudson Decl., ¶12.) If a claimant receives  
14 an offer and rejects it, he or she is free to submit his or her claim to the NPFC for  
15 resolution or proceed in a lawsuit. (*Id.*) By accepting the prepayment, claimants are not  
16 foregoing their opportunity to file a lawsuit; rather they are making a good faith  
17 commitment to attempt to resolve their claims through the claims process.<sup>5</sup> (*Id.*)

18 To date, approximately 250 crab boat owners/operators have submitted claims. No  
19 less than 40 crewmembers have submitted claims, and at least 11 leading processors  
20 have submitted claims. (Hudson Decl., ¶8.) In accepting, rejecting and processing claims  
21 through the claims process, *HMMS receives no direction from Regal Stone or any*  
22 *of the other Defendants in this matter.* (Hudson Decl., ¶4.)

23 If HMMS is contacted by a claimant whom HMMS knows to be represented by  
24

25  
26 <sup>5</sup> Cynthia Hudson met by telephone with William Audet, counsel for Plaintiffs in this action. During that  
27 telephone conversation, Ms. Hudson explained the claims process thoroughly to Mr. Audet, including  
28 documentation needed and the requirements for obtaining prepayments. Ms. Hudson *clearly* told Mr.  
Audet that, by submitting claims, his clients would not forgo the right to litigation of any unsettled claim  
or for long term damage to the crab population/fishery, if any. (Hudson Decl., ¶10.)

counsel, HMMS instructs that individual that HMMS can not speak with them directly without their counsel present, but HMMS encourages them to have their counsel contact HMMS to submit their claim. (Hudson Decl., ¶9.) Claimants who have already filed litigation are entitled to submit a claim through the claims process, but are not entitled to a prepayment unless they and their attorneys agree to make a good faith attempt to resolve their claim through the claims process. (Hudson Decl., ¶12.)

The United States Coast Guard ("USCG") is also very involved in this process. In fact, HMMS submits a daily/weekly report to the USCG Incident Command Center with respect to claims submitted and resolved. Further, the USCG, through FOSC Captain Paul Gugg (and various unified/incident command representatives), have been provided with extensive information regarding the claims process and efficacy. (Hudson Decl., ¶13.) If at any time the USCG or NPFC is unhappy with the claims process established by HMMS, the USCG or NPFC can unilaterally take over the claims process. (*Id.*) In addition, seven days ago, Ms. Hudson presented to the NPFC in Washington D.C a detailed report regarding the claims process, the requirements to submit a claim, the need and requirements for prepayments, the documentation needed for final resolution and the efficacy of the claims process. (Hudson Decl., ¶13.) HMMS has never been told nor has it ever been inferred to HMMS that the claims process established by HMMS is viewed by the USCG or the NPFC as anything less than exemplary. (*Id.*)

## **V. NO AUTHORITY EXISTS FOR THIS COURT TO INTERFERE WITH THE CLAIMS PROCESS**

### **A. PLAINTIFFS' ARGUMENT THAT THE COURT HAS AUTHORITY TO LIMIT COMMUNICATIONS IS MISGUIDED**

To support their misguided position that the district court has authority to limit the communications between HMMS and individuals who are not before this court, Plaintiffs rely heavily on the Supreme Court case of Gulf Oil v. Bernard, 452 U.S. 89 (1981). Gulf Oil is not only factually distinguishable from the present motion, but it is



1 also misquoted by Plaintiffs throughout their motion. In Gulf Oil, an employment  
2 discrimination case, *defense counsel* petitioned the district court to limit communications  
3 between prospective class members and the named plaintiffs or their counsel. Id. at 89.  
4 The district court imposed a complete ban on all communications between parties or  
5 their counsel and any actual or potential class members because of plaintiffs' counsel's  
6 interference with the conciliation efforts of the defendant. Id. The Supreme Court held  
7 that the ban was unjustified by the record and an abuse of discretion. Id. As is readily  
8 apparent, Gulf Oil is not instructive in the context of Plaintiffs' Motion and does not  
9 support Plaintiffs' contention that this court has authority to limit communication  
10 between HMMS – a third party claims processor – and the claimants whose claims are  
11 being processed by HMMS.

12 In addition, Plaintiffs' argument that Gulf Oil allows this court to limit  
13 communications without requiring actual proof of harm is similarly misguided. Rather,  
14 the Court stated that the discretion of the district court to exercise control over a class  
15 action and to enter appropriate orders governing the conduct of counsel and parties "is  
16 not unlimited, and indeed is bounded by the relevant provisions in the Federal Rules."  
17 Id. at 100. Furthermore, an order limiting communications between parties and  
18 potential class members "should be based on a *clear record and specific findings* that  
19 reflect a weighing of the need for a limitation and the potential interference with the  
20 rights of the parties." Id. at 101 (emphasis added) (see also Id. at 102, the district court  
21 "may not exercise the power without a *specific record* showing by the moving party of the  
22 particular abuses by which it is threatened" (emphasis added) citing Cole v. March, 560  
23 F.2d 186, 189 (3<sup>rd</sup> Cir. 1977)).

24 Moreover, Plaintiffs erroneously cite Gulf Oil as stating that the court need not  
25 wait for actual harm but only the "likelihood of serious abuse" before limiting  
26 communication. (Motion 8:21). In fact, the Gulf Oil Court cautioned that "the mere  
27 possibility of abuses does not justify routine adoption of a communications ban . . . in the  
28



1 absence of a clear record and specific findings of need.” *Id.* at 104.

2 Plaintiffs’ contention that the court needs to limit communications in this case to  
3 maintain the integrity of the putative class and preserve the litigation rights of putative  
4 class members also misses the mark. This “class action” consists of nothing more than a  
5 complaint filed with the court in November, 2007. Not only is the proposed class not  
6 certified, *Plaintiffs have yet to serve a single party*. Plaintiffs attempt to halt the  
7 Claims Process in the face of their own failure to diligently prosecute their lawsuit is  
8 particularly egregious.

9 Finally, Plaintiffs state that the district court should limit communication to  
10 further the policy of Rule 23. However, nothing in Rule 23 stands for the proposition  
11 that class action litigation – a necessarily costly and time consuming process – is in any  
12 way superior to a claims process in which claimants need only prove up their damages to  
13 receive full compensation. In fact, the *only* parties who benefit from litigation in lieu of a  
14 federally mandated and supervised claims process are the attorneys involved.

15  
16 **B. THE CLAIMS PROCESS IS ENTIRELY COMPLIANT WITH**  
17 **FEDERAL LAW**

18 As set forth above, OPA ’90 governs oil spill liability under federal law. Parties  
19 deemed responsible for the oil spill are obligated to respond in compliance with OPA ’90.  
20 This not only includes the clean-up efforts, but also the process by which those damaged  
21 by the oil spill may present claims to the Responsible Party and be compensated. The  
22 claims process was enacted by Congress as part of OPA ’90 to provide a prompt,  
23 federally-coordinated response to oil spills and to compensate victims.

24 OPA ’90 provides that all claims for damages shall be presented first to the party  
25 responsible for the spill. 33 U.S.C. § 2173(a). If such a claim is presented and the  
26 responsible party denies liability or the claim is not settled within 90 days, the claimant  
27 may elect to commence an action in court against the responsible party. 33 U.S.C. §  
28 2713(c). Plaintiffs who fail to comply with the prerequisites for bringing such a claim

1 and proceed immediately to litigation must have their claims dismissed by the court.  
2 See, Johnson v. Colonial Pipeline Co., 830 F. Supp. 309, 310 (E.D. Va. 1993), see also  
3 Abundiz v. Explorer Pipeline Co., 2003 WL 230960198, at \*3 (N.D. Tex. 2003).

4 Plaintiffs claim that this process binds claimants to the OPA '90 process and  
5 unfairly requires them to go through the Claims Process without court supervision.  
6 However, the actual purpose of the claim presentation procedure is to promote  
7 settlement and to avoid costly and cumbersome litigation. Johnson, 830 F. Supp. at 310-  
8 311, 135 Cong. Rec. at H 7962, 7965 (statements of Rep. Hammerschmidt and Rep.  
9 Lent). The claim process enables the parties to negotiate and settle if possible the  
10 potential claims without having to resort to litigation. Johnson, 830 F. Supp. at 311. As  
11 is evidenced by the Claims Process at issue, the requirements of OPA '90 provide many  
12 claimants with relief that they would not otherwise get absent costly and lengthy legal  
13 action. Indeed, as set forth in the Declarations of John G. Young and Michael Duncheon,  
14 claimants, their counsel, and HMMS acknowledge "the desirability of achieving an early  
15 resolution of claims" and agree that the Claims Process "may be superior to a class  
16 action or, at least that, as OPA intended, it may reduce the issues that need to be  
17 litigated." (Young Decl., ¶ 7; Declaration of Michael Duncheon ("Duncheon Decl."), ¶ 7.)

18 Further, HMMS's Claims Process is monitored by the USCG, which could at any  
19 time, revoke its authority to settle the claims if the process was determined to be  
20 fraudulent, misleading, or in any way in conflict with the requirements of OPA '90.  
21 Despite careful monitoring, the USCG has not taken any action to alter the Claims  
22 Process established by HMMS. This Court should defer to the USCG's authority over  
23 the federally mandated Claims Process that is currently providing fishermen and others  
24 with compensation. To stop this process in order to provide Plaintiffs' counsel with a  
25 bigger class – and ultimately a larger fee award – would unduly interrupt an inherently  
26 fair, efficient and just process developed by Congress.  
27  
28

1           C.     THE CLAIM FORM AND ALL RELATED COMMUNICATIONS ARE  
 2                 ENTIRELY APPROPRIATE

3           As set forth above, HMMS – *and not Regal Stone or any other Defendant* –  
 4 processes claims in compliance with OPA '90, and HMMS's handling of the Claims  
 5 Process has been deemed satisfactory by the U.S. Coast Guard. Moreover, the Claims  
 6 Process is ultimately approved by the NPFC. There is no legal basis for Plaintiffs'  
 7 contention that the claims form must contain information about this class action. To be  
 8 sure, there is no basis for Mr. Audet's self-serving assertion that contact information for  
 9 his law firm be included on the form.

10           Contrary to Plaintiffs' contention, the Burford, Jenifer, and Ralph Oldsmobile  
 11 cases do not support Plaintiffs' contention that the claims form at issue is inadequate.  
 12 As an initial matter, none of these cases involve claims forms or releases similar to those  
 13 used in the OPA '90 claims process. Burford v. Cargill, Inc., 2007 WL 81667 (W.D. La.  
 14 Jan. 9, 2007); Jenifer v. Delaware Solid Waste Authority, 1999 WL 117762 (D. Del. Feb.  
 15 25, 1999); Ralph Oldsmobile, Inc. v. General Motors Corp., 2001 WL 1035132 (S.D.N.Y.  
 16 Sept. 7, 2001). Moreover, none of the cases involve a federally mandated claims process  
 17 like the one at issue here (requiring, for example, that all claims paid be submitted to  
 18 the NPFC for review in order to ensure that claimants were adequately compensated).  
 19 Instead, all three cases involve defendants who affirmatively reached out to potential  
 20 class members seeking releases. In addition, unlike the Claims Process at issue here –  
 21 where liability issues are not in play – the cases cited by Plaintiffs involve defendants  
 22 seeking releases that *limit* liability.

23           Notably, should the Claims Process administrator – HMMS – deny a claimant's  
 24 claim in whole or in part, OPA '90 allows for a private right of action. In addition, if a  
 25 claim is denied a claimant can seek relief directly from the NPFC before turning to  
 26 litigation. Plaintiffs' contention that the claims form at issue somehow usurps a  
 27 potential claimants' right to seek redress should they be dissatisfied with the Claims  
 28 Process must be rejected outright.

1           **D.    PLAINTIFFS ARE ATTEMPTING TO INTERFERE WITH OTHER**  
 2           **ATTORNEY/CLIENT RELATIONSHIPS**

3           As is evidenced by the concurrently filed Declarations of Michael Duncheon, John  
 4 Young and Cynthia Hudson, several attorneys representing over 196 claimants in total  
 5 have been working with HMMS since November to provide their clients with relief.  
 6 Plaintiffs are requesting the Court to require HMMS to send these *represented* claimants  
 7 a claim form and notice “which informs such members of their right to rescind their  
 8 former agreement” and enter into “the agreement embodied in the Revised Claim Form.”  
 9 (*See*, Plaintiffs’ Motion, 25:3) Not surprisingly, Plaintiffs have requested that the  
 10 Revised Claim Form include information about the class action and Mr. Audet’s contact  
 11 information. Mr. Audet is essentially asking the Court to order HMMS to solicit *already*  
 12 *represented* clients for his class action. This is not only illogical, it is arguably unethical.

13           In his Declaration, Mr. Duncheon makes clear that his primary goal in  
 14 representing his clients is “first and foremost, to secure interim compensation for clients  
 15 who suffered severe hardship...” (Duncheon Decl., ¶ 4.) Indeed, Mr. Duncheon notes  
 16 that “the prospect of an early resolution of significant issues is realistic and in our  
 17 clients’ best interests. We specifically desired to avoid the situation that arose in Alaska  
 18 following the oil spill caused by the Exxon *Valdez*, where litigation has been protracted  
 19 for years without payment to the injured parties.” (Duncheon Decl., ¶ 5.) Moreover,  
 20 altering – or *enjoining* – the Claims Process, would unwind the efforts these attorneys  
 21 have made on behalf of their clients, through extensive arm’s-length negotiation, to  
 22 develop “a claims process that we believe is expeditious, fair and reasonable.”  
 23 (Duncheon Decl., ¶8.) Notably, Mr. Duncheon confirms that “[t]he claims process  
 24 initiated by Hudson was the result of negotiations with us, and...the result of  
 25 negotiations with other attorneys representing crab fishermen. It was not unilaterally  
 26 imposed by the Responsible Party or Hudson Marine.” (Duncheon Decl., ¶¶ 9, 10.)

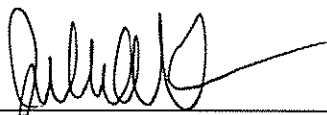
27           Similarly, Mr. Young’s Declaration sets forth that his firm’s primary goal in  
 28 representing 45 independent fisherman has been “to secure for our clients full

1 compensation for the economic losses they have incurred as a result of the spill..." and  
2 that "[w]e have advised our clients that there will be ample time to determine whether  
3 there are additional claims for which compensation is appropriate and if litigation is  
4 needed." (Young Decl., ¶ 5.) Mr. Young notes that his firm and the clients he represents  
5 did not authorize anyone to file a class action on his clients' behalf, and "[i]n fact, I have  
6 advised against filing a litigation at this time." (Young Decl., ¶ 7.) As is readily  
7 apparent, Plaintiffs' attempt to interfere with the Claims Process would, in effect,  
8 thwart the objectives of these and other counsel and their clients seeking near-term  
9 relief through the Claims Process.

## 10 VI. CONCLUSION

11 Plaintiffs' unprecedented request to enjoin a process by which potential class  
12 members can avoid costly and drawn out litigation is highly suspect. Not surprisingly, it  
13 is unsupported by statutory authority, case law, or orders of the court. Plaintiffs'  
14 attorneys are attempting to interfere with the Claims Process for one reason and one  
15 reason only – they do not benefit from it. Only by preserving a class of claimants who  
16 have not been made whole through the Claims Process will Plaintiffs' attorneys  
17 potentially be entitled to a windfall fee award. Plaintiffs have presented absolutely no  
18 authority for the proposition that this court can or should interfere with a federally  
19 mandated Claims Process. Plaintiffs' request for an order to show cause should be denied.

20  
21  
22 DATED: January 18, 2008

  
\_\_\_\_\_  
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